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Nos. 84-1493 & 84-1509

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL NO. 1182, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, *et al.*,
Respondents.

and

SEATTLE-FIRST NATIONAL BANK,
Petitioner,
v.
FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL NO. 1182, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONER SEATTLE-FIRST NATIONAL BANK

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QUESTION PRESENTED FOR REVIEW

Whether the National Labor Relations Board acted rationally and in a manner consistent with the National Labor Relations Act when it refused to amend its certification of the exclusive bargaining representative for all unit employees of Seattle-First National Bank based upon the results of an affiliation election in which only some unit employees—union members—could vote.

LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

Seattle-First National Bank is a wholly-owned subsidiary of Seafirst Corporation, which is, in turn, a wholly-owned subsidiary of BankAmerica Corporation. All of Seattle-First National Bank's subsidiaries are wholly owned, excluding director qualifying shares in certain instances. BankAmerica Corporation's subsidiaries (except wholly-owned subsidiaries) are: Investment Guaranty Corporation, Banca d'America e d'Italia, BankAmerica Options, Inc., BA Australia Limited, BA Finance (Switzerland) Ltd., Bank of America Cameroon S.A., Commercial Bank of Africa Ltd., BA Servicios, S.A., and Consumer Credit Service, Inc. Should the Court desire disclosure of wholly-owned subsidiaries of BankAmerica Corporation, Seattle-First National Bank will supplement its list of subsidiaries and affiliates.

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On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONER SEATTLE-FIRST NATIONAL BANK

Petitioner Seattle-First National Bank respectfully requests that this Court reverse the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 2, 1984.

OPINION BELOW

The opinion of the Ninth Circuit is reported at *Financial Institution Employees of America, Local No. 1182 v. NLRB*, 752 F.2d 356 (9th Cir. 1984). It is found in the Appendix to Seattle-First National Bank's Petition for a Writ of Certiorari at pp. 1a through 27a. The Ninth Circuit's order denying the Bank's petition for rehearing and rejecting its suggestion for rehearing en banc is reported at *Financial Institution Employees of America, Local No. 1182 v. NLRB*, 750 F.2d 757 (9th Cir. 1984), and is found in the Appendix to Seattle-First National Bank's Petition for a Writ of Certiorari at pp. 28a through 31a. The National Labor Relations Board's decisions and orders in this proceeding are reported at 241 N.L.R.B. 751 (1979), 245 N.L.R.B. 700 (1979), and 265 N.L.R.B. 426 (1982). They appear in the Appendix to Seattle-First National Bank's Petition for a Writ of Certiorari at pp 33a-54a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 2, 1984. That court denied a timely petition for rehearing on December 26, 1984. Cert. App. 28a.[1] The National Labor Relations Board filed its Petition for a Writ of Certiorari on March 22, 1985. Seattle-First National Bank filed its Petition for a Writ of Certiorari on March 25, 1985. The Court on May 13, 1985, granted the writs and consolidated the cases for argument. J.A. 236-37. The Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] The decisions contained in the Appendix to Seattle-First National Bank's Petition for Writ of Certiorari will be cited "Cert. App." "R." designates references to the transcript of the hearing on the petition for amendment of certification. "Ex. E." and "Ex. P." refer to exhibits introduced by the Bank and Local 1182, respectively. "C.R." indicates a reference to the Board's Certified Record, filed with the Ninth Circuit. "J.A." designates references to the Joint Appendix filed by the parties to this proceeding.

STATUTES AND REGULATIONS INVOLVED

Section 1 of the National Labor Relations Act (the "Act"), 29 U.S.C. § 151, provides, in pertinent part:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 7 of the Act, 29 U.S.C. § 157, provides, in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

Section 9(a) of the Act, 29 U.S.C. § 159(a), provides, in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

Section 102.60(b) of the Rules and Regulations of the National Labor Relations Board, 29 C.F.R. § 102.60(b), provides, in pertinent part:

Petition for clarification of bargaining unit or petition for amendment of certification under § 9(b) of the Act; who may file; where to file; withdrawal. A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question concerning representation, may be filed by a labor organization or by an employer. . . .

STATEMENT OF THE CASE

This case arises out of the 1978 affiliation of the Firstbank Independent Employees Association (the "Independent"), the certified bargaining representative of Seattle-First National Bank's employees, with the Retail Clerks International Union (the "RCIU"). The right to vote in the election approving that affiliation was limited to members of the Independent, excluding more than 2,100 of the 4,790 Bank employees represented by the Independent. The question presented is whether the National Labor Relations Board acted rationally and in a manner consistent with the National Labor Relations Act when, because of the exclusion of nonunion unit employees from the vote, it refused to amend its certification to designate the RCIU affiliate as the exclusive bargaining representative of the Bank's employees.

The History of Representation at Seattle-First National Bank.

From 1938 until 1969, an independent association represented Seattle-First National Bank's employees. R. 15. The members of this association in 1970 voted to affiliate with the Marine Engineers Beneficial Association ("MEBA"). R. 16 (J.A. 5). Later that same year, however, the National Labor Relations Board conducted an election in which employees ousted MEBA in favor of the Independent, an unaffiliated entity representing only employees of Seattle-First National Bank, R. 118 (J.A. 21), which was certified as the exclusive bargaining rep-

resentative of unit employees on November 30, 1970. R. 17-18 (J.A. 6); Exs. P-1(a), P-1(b). In 1971, the Bank and the Independent negotiated a three year agreement. R. 18 (J.A. 6). The parties entered into a second three year contract in 1974, R. 18 (J.A. 6), which expired on October 30, 1977. R. 13 (J.A. 4). Bargaining between the Bank and the Independent for a third contract began in the summer of 1977, R. 25, and extended into early 1978. R. 178.

The Affiliation With the RCIU.

The Independent's Executive Council first considered an affiliation in 1974, when it recommended that the Independent affiliate with the Office and Professional Employees International Union ("OPEIU"). R. 19 (J.A. 7). After that effort failed in a 1974 election, R. 21 (J.A. 7), the Independent's Executive Council took steps "to make passing of the affiliation easier." R. 21-22 (J.A. 7). By the summer of 1977, after commencement of bargaining on a new contract with the Bank, R. 25, the Independent's leadership began discussing affiliation with a number of national labor organizations, including the United Auto Workers, the International Brotherhood of Electrical Workers, the International Longshoremen and Warehousemen's Union, and the Service Employees International Union, as well as the RCIU and the OPEIU. R. 28.

By letter dated January 6, 1978, the Independent gave notice of its intent to submit to its membership the question of an affiliation with the RCIU. Ex. P-6 (J.A. 72-74); R. 35-36 (J.A. 12-13). The Independent's constitution limited voter eligibility to members "in good standing on the last working day of the month prior to the notice of election." Ex. P-2, Art. III(C,D) (J.A. 52); R. 23-4. Nevertheless, the Independent encouraged nonmembers to join the union and vote in the affiliation election, provided they paid one month's dues prior to

January 19, 1978. Ex. P-6 (J.A. 74); R. 35-36 (J.A. 12-13). Unit employees who did not join the Independent by that date were excluded from the vote, R. 199, even though the Bank advised the union that applicable precedent required their participation. R. 250-51 (J.A. 48); Exs. P-8 (J.A. 75-76), P-18 (J.A. 90-91); R. 37-38 (J.A. 12), 56-57; Ex. P-23(d) (J.A. 92), R. 67 (J.A. 19). *See Jasper Seating Co.*, 231 N.L.R.B. 1025 (1977). As a consequence, although the Independent represented 4,790 unit employees, R. 74 (J.A. 19), only 2,624 ballots were mailed on February 5, 1978.[2] Ex. P-15 (J.A. 87), R. 50-1. Those voting in favor of affiliation numbered 1,206, 25.17% of the bargaining unit. Ex. P-14 (J.A. 84), R. 50-1. Those opposed (774) and those not permitted to vote (2,166) amounted to 2,940 employees, or 61.4% of the unit. *See id.* Based on these results, the Independent's officers applied for an RCIU charter, which was issued to Financial Institution Employees of America, Local 1182 ("Local 1182"), effective April 1, 1978. R. 55; Ex. P.17 (J.A. 88-89), R. 54 (J.A. 13).

The Amendment of Certification Proceedings.

On June 19, 1978, the new RCIU affiliate filed a petition with the Board to amend the 1970 certification of exclusive bargaining representative by substituting Local 1182 for the Independent. C.R. 1. The Bank resisted the petition, arguing *inter alia* that (1) the affiliation election could not serve as the foundation for an amended certification under *Jasper Seating* because the Independent had deprived more than 2,000 represented employees of the opportunity to vote, C.R. 4, pp. 30-35; and (2) the certification could not be amended without a Board-

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[2] It is not clear that the Independent had this many members. In January 1978, only 1,569 members paid monthly dues. R. 189-90. Voters included numerous individuals who had been on dues checkoff prior to October 15, 1977, but who had not subsequently paid dues. R. 109. The union did not know how many of these employees considered themselves members. R. 79.

conducted election because the affiliation had created a new and different union, raising a question concerning representation that only a Board election could resolve. C.R. 4, pp. 5-30.

In response, Local 1182 argued that only "those who have a membership interest" in the certified entity must be permitted to vote in an affiliation election. C.R. 7, p. 17. With respect to the Bank's assertion that Local 1182 was a "new and different" union from the Independent, the Union claimed that there was continuity between Local 1182 and the Independent, and that the affiliation resulted in no significant loss of local autonomy because the International only rarely exercised its power over locals. C.R. 7, pp. 23-26.

The Board initially rejected the Bank's arguments and on April 5, 1979, issued a decision amending the certification as requested. Cert. App. 49a-54a; *Seattle-First National Bank*, 241 N.L.R.B. 751 (1979). After the Bank refused to bargain with Local 1182, as required to obtain judicial review of the certification decision, Local 1182 filed unfair labor practice charges. The Bank defended by asserting the invalidity of the amended certification. C.R. 13. It offered petitions signed by hundreds of bargaining unit employees who were not union members, protesting their exclusion from the affiliation vote. C.R. 16 (Versoi Aff., Attachment D). The Bank also pointed to new evidence of a lack of continuity between the Independent and Local 1182. *Id.* (Versoi Aff., pp. 2-4) Despite this proffer, the Board held no evidentiary hearing on the unfair labor practice charges. On September 28, 1979, it issued a decision and order finding that the Bank had violated the Act by reason of the refusal to bargain. Cert. App. 39a-48a; *Seattle-First National Bank*, 245 N.L.R.B. 700 (1979).[3]

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[3] Before disposition of the unfair labor practice charge, the RCIU merged with the Amalgamated Meat Cutters and Butcher Workmen to form the United Food and Commercial Workers Inter-

The Bank sought review of the Board's decision in the Ninth Circuit. *Seattle-First National Bank v. NLRB*, No. 79-7515 (9th Cir.). While the Bank's petition for review was pending, the United States Court of Appeals for the Fifth Circuit issued its decision in *Amoco Production Co. v. NLRB*, 613 F.2d 107 (5th Cir. 1980), remanding that case to the Board for further consideration of factual issues related to the continuity of a bargaining representative after affiliation. Because the Board had relied upon *Amoco Production Co.* (*Amoco III*), 239 N.L.R.B. 1195 (1979), in granting Local 1182's petition for an amended certification, Cert. App. 52a, it asked that the Ninth Circuit remand this case for further consideration in connection with *Amoco*. *See* Cert. App. 34a.

On remand, the Board in *Amoco Production Co.* (*Amoco IV*), 262 N.L.R.B. 1240 (1982), held that union-conducted affiliation elections could not be accepted "as a basis for amending Board certifications" unless all bargaining unit employees were afforded "*the opportunity to vote.*" 262 N.L.R.B. at 1241, quoting *North Electric Co.*, 165 N.L.R.B. 942, 944 (1967) (Members Jenkins and Zagoria, dissenting) (emphasis in original). The Board majority wrote that its holding was compelled by the requirement "that the selection of a bargaining representative be made by the employees in the bargaining unit." *Id.* Following this reasoning, the Board in this case reconsidered its prior decision and held that the affiliation election could not serve as the foundation for an amended certification because it had excluded from the vote all unit employees who did not belong to the Independent. Cert. App. 33a-37a; *Seattle-First National Bank*, 265 N.L.R.B. 426 (1982). The Board revoked the amended certification and dismissed the unfair labor practice charge against the Bank. Cert. App. 34a.

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national Union (the "UFCW"). Cert. App. 39a-40a, n.1. This case presents no question concerning the propriety of that merger.

The Proceedings in the Court Below.

Local 1182 filed a petition for review of the Board's decision in the court below. On August 2, 1984, a panel of the court of appeals granted the petition and remanded the case, ruling that the Board could not refuse to amend its certification solely because the union had excluded many of the unit employees it represented from the decision to affiliate. Cert. App. 1a-27a. The panel found the Board's rule to be "irrational and inconsistent with the National Labor Relations Act" for three reasons. First, assuming the affiliation decision to be an "internal" union matter, the panel found that the Board's rule violated the policy of noninterference in internal union affairs. Cert. App. 11a-17a. Second, the panel concluded that permitting all employees to vote in affiliation elections would undermine stability in bargaining relationships. Cert. App. 17a-19a. Third, the panel found the Board's rule irrational because of its belief that the Board's previous rules with respect to affiliations were "effective" in protecting employees' statutory rights. Cert. App. 20a-23a.

Judge Wright dissented. Observing that the Fifth Circuit had enforced the Board's decision in *Amoco IV*, see *Local No. 4-14, OCAW v. N.L.R.B.*, 721 F.2d 150 (5th Cir. 1983), he expressed disagreement with each of the three premises of the panel majority's decision. Judge Wright found justification "within the statutory framework" for the Board's conclusion that an affiliation election is not exclusively an internal union affair. Cert. App. 25a-26a. In addition, he concluded that "[t]he Board's rule will promote stability more effectively than did its former position." Cert. App. 26a. Finally, rejecting the panel majority's finding that the Board's ruling was irrational, Judge Wright observed that "[t]he adequacy of the old procedure is irrelevant" in determining whether the Board acted in conformity with its statutory responsibilities. Cert. App. 26a-27a.

The Bank petitioned for rehearing on August 16, 1984, suggesting rehearing en banc. On December 26, 1984, the Ninth Circuit denied the petition for rehearing and rejected the suggestion for en banc consideration. Cert. App. 28a. Judge Kennedy, joined by Judges Sneed, Anderson and Hall, and Judge Norris, joined by Judges Poole and Hall, dissented from the denial of rehearing en banc. Cert. App. 29a-31a. Both dissents referred to and expressed agreement with the Fifth Circuit's approval of the Board's rule in *Local No. 4-14, OCAW v. NLRB*, 721 F.2d 150. Cert. App. 29a, 31a.

SUMMARY OF ARGUMENT

Under the National Labor Relations Act, a labor organization freely selected by a majority of employees in a bargaining unit serves as the exclusive representative for all employees in that unit. 29 U.S.C. § 159(a). One of the Board's statutory duties is to "certify the results" of elections conducted to determine if a union has the required majority support. 29 U.S.C. § 159(c). Nothing in the Act requires the Board to amend its certification to reflect a subsequent union affiliation. Nevertheless, the Board has granted such amendments, subject to certain prerequisites.

This case concerns one of those prerequisites. Because a certified union acts as the exclusive representative of all unit employees, not simply union members, the Board has determined that it will decline to amend a certification based upon an affiliation election in which only union members are permitted to vote. *Amoco IV*, 262 N.L.R.B. 1240 (1982), *aff'd sub nom. Local No. 4-14, OCAW v. NLRB*, 721 F.2d 150 (5th Cir. 1983). The Board has reasoned that the amended certification implicates the selection of employees' exclusive bargaining representatives, in which nonunion unit employees have a statutory right to participate. This reasoning finds ample support in the Act.

I. In the Act, Congress declared a national policy of protecting employees' "full freedom" in designating their bargaining representatives. 29 U.S.C. § 151. By this, Congress meant that employees would be guided by "[t]heir own best judgment, not that of someone else" in selecting organizations to speak on their behalf. *Hill v. Florida ex rel. Watson*, 325 U.S. 538, 541 (1945). The Board's decision in this case advances this policy, holding that all unit employees are entitled to exercise their own best judgment in deciding whether they wish to be represented by an established independent union or by a new local of a large, international labor organization.

In contrast, the decision of the court below impairs employee free choice. The court of appeals would deny nonunion employees the right to participate in a decision to seek an amended certification unless the Board first determines that the new affiliate is substantially different from the certified entity. This reasoning permits the Board to determine when nonunion employees may exercise their "full freedom" to select a bargaining representative. The court below thus ignored the real possibility that differences between unions—such as the fact that one is independent, while another is affiliated with an international body—may be vitally important to employees, although appearing less significant to outsiders such as the Board. Only by allowing employees to express their views on these issues, as the Board's decision does, may employees' "full freedom" be protected.

II. The Board's rule on affiliations also enhances prospects for industrial peace, in conformity with express Congressional intent. Congress clearly stated its belief that stability in labor relations, one of the primary goals of the Act, can be achieved only by assuring employees the fullest possible freedom in selecting their bargaining representatives. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956). A policy of excluding

nonunion employees (who here comprise more than 45% of the bargaining unit) from an election that will serve as the basis for an amended certification runs the real risk of forcing the employer to bargain with a union that does not enjoy, and never has enjoyed, majority support. A stable collective bargaining relationship cannot be built on such a shaky foundation.

Oddly, the court below found that the Board's rule impaired labor stability, pointing out that incumbent unions enjoy various presumptions designed to restrict challenges to their majority status. Nothing in the Board's decision, however, disturbs these presumptions. In the absence of bargaining unit consent to a change, the Board's rule permits the incumbent union to continue in its representational capacity. If represented employees do consent, on the other hand, the Board may allow an amended certification. Following these simple procedures enhances stability by assuring the parties that the true representative of all unit employees is speaking on their behalf.

III. The Board's rule does not intrude upon any legitimate internal union interest. The union here sought an amended certification to cement its claim to representation of the Bank's employees, not for any internal purpose. Thus, the Board did not have occasion to consider the internal effects of the affiliation vote. Rather, recognizing the distinction between a union's capacity as an association of dues-paying members and its capacity as a statutory bargaining agent, the Board considered only Local 1182's claim that it was the exclusive representative for all Bank employees. That was not an internal union matter.

Furthermore, to the extent the effort to amend the Board's certification implicates internal union interests, they must be subordinated to the Act's primary policy of protecting employee freedom. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 279 (1973). A union cannot excuse

its violation of national labor policy simply by claiming that enforcement of that policy would intrude upon "internal" union affairs. *Scofield v. NLRB*, 394 U.S. 423, 430 (1969). That is especially true here, where the union has no legitimate internal interest in excluding nonunion unit employees from participation in the decision to seek an amended certification of their exclusive bargaining representative.

IV. Because the Board's rule involves the selection and certification of bargaining representatives, it is entitled to considerable deference. *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946). The court below, however, conducted a *de novo* review of the issues, reweighing each of the considerations addressed by the Board. In particular, the court of appeals improperly reassessed the "need" for the Board to adopt its rule protecting employee free choice. *See NLRB v. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). Standing alone, this failure to show due deference to the Board's administrative expertise requires reversal of the decision below.

ARGUMENT

I. BY REQUIRING EVIDENCE OF EMPLOYEE CONSENT AS A PREREQUISITE TO AMENDMENTS OF UNION CERTIFICATIONS, THE BOARD'S RULE FURTHERS THE FUNDAMENTAL NATIONAL LABOR POLICY PROTECTING THE "FULL FREEDOM" OF EMPLOYEES TO SELECT THEIR BARGAINING REPRESENTATIVES.

Congress has declared that national labor policy requires protection of "the exercise by workers of *full freedom* of association, self-organization, and designation of representatives of their own choosing . . ." § 1 of the Act, 29 U.S.C. § 151 (emphasis added). Congress thereby expressed its intent that employees, like any voters in a democracy, be guided solely by their own judgment in choosing their statutory bargaining representative, free

from the dictates of those who might profess to have their best interests at heart. The decision below would, perhaps unwittingly, undermine employees' "full freedom" of choice by conferring upon the Board and the courts, rather than upon affected employees, the right to determine whether an affiliation effects a change in bargaining representative sufficiently significant to warrant an expression of employee consent. The Board's rule, on the other hand, appropriately vests in all unit employees the power to express their views on the significance of the change that affiliation would effect.

A. This Court Has Recognized Employees' Absolute Right to Choose Their Bargaining Representatives.

This Court has not hesitated to protect the unfettered right of employees to choose the entity that will act as their exclusive bargaining agent. In *Hill v. Florida ex rel. Watson*, 325 U.S. 538 (1945), the Court considered a Florida statute that imposed licensing and reporting requirements on unions and their business agents. Justice Black, writing for the majority, began his analysis by emphasizing the broad scope of employee discretion that Congress intended:

> The declared purpose of the Wagner Act, as shown in its first section, is to encourage collective bargaining, and to protect the "full freedom" of workers in the selection of bargaining representatives of their own choice. . . . Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide.

325 U.S. at 541. The Court thus held that the Wagner Act preempted the Florida statute, concluding that "the 'full freedom' of employees in collective bargaining which Congress envisioned as essential to protect the free flow of commerce among the states would be, by the Florida statute, shrunk to a greatly limited freedom." 325 U.S. at 542.

Justice Black's expansive view of employee freedom in designating bargaining representatives remains a vital principle of national labor policy, despite some later limitations on a union's right to select its officers and agents. *See DeVeau v. Braisted*, 363 U.S. 144, 147 (1960) (upholding restrictions on unions' right to employ convicted felons). In *Brown v. Hotel Employees Local 54*, 104 S. Ct. 3179 (1984), for example, the Court upheld a New Jersey statute that restricted the class of persons eligible to hold office in unions representing casino employees. Although characterizing the right to select union officials as "less than absolute," the majority emphasized "that this conclusion does not implicate the employees' express § 7 right to select a particular labor union as their collective bargaining representative . . . ." 104 S. Ct. at 3190. Justice White, joined in dissent by Justices Stevens and Powell, agreed that employees have an "absolute § 7 right to choose which labor organization will act as their bargaining representative . . . ." 104 S. Ct. at 3192-93, n.3. The dissenters observed that even "a nonunion employee in an agency shop retains his § 7 right to participate in the selection of the bargaining representative," though he may forfeit his right to participate in certain decisions delegated to that representative. *Id.*

The fact that an employee chooses not to join a union, then, does not limit his "full freedom" to choose a bargaining representative. *See* § 7 of the Act, 29 U.S.C. § 157 (granting employees "the right to refrain from" union activities). Unlike the selection of union officers, this fundamental right cannot be contingent upon union membership. In contrast to the decision below, the Board's ruling here recognized this principle.

B. The Rule Applied by the Board in This Case Protects Employees' Full Freedom in Designating Their Bargaining Representatives.

Section 7 of the Act implements the Congressional policy protecting employees' "full freedom" of association

by guaranteeing their right "to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157. Representatives chosen freely

> by the majority of employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for purposes of collective bargaining . . . .

§ 9(a) of the Act, 29 U.S.C. § 159(a). Although less formal methods exist, a Board-conducted election is the preferred method of determining exclusive representative status. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969). Thus, when the Board finds that "a question of representation exists"—that is, when it determines that there is a question "as to a claimed majority status" of a labor organization, *Standard Oil Co.*, 127 N.L.R.B. 656, 657 (1960) (Member Leedom, dissenting)—it will supervise an election to resolve the question. *See* § 9(c) of the Act, 29 U.S.C. § 159(c). The Board then "certifies" the results of this election, removing doubt as to the representative's status. *Id.*

The Act neither provides for nor mentions "amended" certifications of exclusive bargaining representatives after an affiliation. However, the Board traditionally has granted amendments without a supervised election provided there is an "absence of a question concerning representation." 29 C.F.R. § 102.60(b); *see* 29 C.F.R. § 101.17 (allowing amendment of certification when "there is no question concerning representation"). Although this rule, which the court of appeals accepted (*see* Cert. App. 8a), does not demand adherence to any rigid formula, it logically requires that the Board satisfy itself that the amendment does not present a question as to the majority support of the union seeking certification. *See J. H. Day Co.*, 204 N.L.R.B. 863 (1973) (amended certification granted only when affiliation procedures "substantially eliminate the possibility of a question concerning representation"). The Board's duty to

protect employee free choice compels this requirement. Because the Board may issue a statutory certification only upon being assured that a bargaining representative has been freely chosen by a majority of unit employees, the petitioning union must show that the change in designation accomplished by the amendment enjoys majority support.

When an affiliation takes "place under circumstances that do not indicate the change reflected a majority view," *North Electric Co.*, 165 N.L.R.B. 942 (1967), the Board has found a question concerning representation, *i.e.*, a doubt as to majority status. Accordingly, "the factor of primary importance is whether the employees have had the opportunity to pass on the change of representative." *Newspapers, Inc.*, 210 N.L.R.B. 8, 9 nn.3-4 (1974), *enf'd* 515 F.2d 334 (5th Cir. 1975). If that opportunity has not been given, the Board cannot conclude that the petitioning union has the majority support that Congress required as a prerequisite to statutory certification. This uncertainty may be resolved only through a Board-conducted election under Section 9(c) of the Act, 29 U.S.C. § 159(c).[4]

The Board has labeled this examination of employee support a "due process" inquiry. It has used "due proc-

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[4] In addition, the Board will inquire into the "continuity" between the certified union and the union seeking the amended certification. If that inquiry shows that the petitioner is a "new and different" union, the Board will find a question concerning representation that requires it to conduct a supervised election before issuing its certification. *See Standard Oil Co.*, 127 N.L.R.B. 656 (1960). At least one court of appeals has indicated that the affiliation of an independent with a large international union creates a "new and different" union. *See American Bridge Div., United States Steel Corp. v. NLRB*, 457 F.2d 660 (3d Cir. 1972); *Sun Oil Co. of Pennsylvania v. NLRB*, 576 F.2d 553 (3d Cir. 1978). Because the Board found the scope of franchise too limited in this instance, it did not reach the continuity question in its 1982 decision. The court of appeals declined to do so as well. Cert. App. 6a, n.4.

ess" not in its constitutional sense, but as a shorthand method of describing its need to assure itself that a union's affiliation procedures were not "so lax or 'substantially irregular' as to negate the validity of the election . . ." *Hamilton Tool Co.*, 190 N.L.R.B. 571, 575 (1971). If due process has been satisfied in an affiliation vote, the Board may not need to conduct its own election, with the more stringent "laboratory conditions" it imposes to guarantee full freedom of choice. *See General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948) (Board elections must "provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees"), *enf'd*, 192 F.2d 504 (6th Cir. 1951), *cert. denied*, 343 U.S. 904 (1952).

Peculiarly, however, a majority of the Board initially held, over vigorous dissent, that due process could be satisfied even if a union-conducted affiliation vote excluded unit employees who were not union members. In *East Ohio Gas Co.*, 140 N.L.R.B. 1269 (1963), the Board first confronted the contention that all unit employees must be permitted to participate in a decision to seek an amended certification premised on an affiliation. The majority, over the dissent of Member Rodgers, sidestepped the issue of voting eligibility, stating simply that "where, as here, adequate opportunity to vote is provided to all those [union members] eligible to vote, the decision of the majority actually voting is binding on all." 140 N.L.R.B. at 1270 (footnote omitted). Even though *East Ohio Gas* pointedly failed to explain *why* the franchise in an affiliation election could be limited to union members, it was regarded as binding precedent, though never without dissent, for 14 years. *See, e.g., North Electric Co.*, 165 N.L.R.B. 942 (Members Jenkins and Zagoria, dissenting); *Hamilton Tool Co.*, 190 N.L.R.B. 571 (Member Jenkins, dissenting); *Bear Archery, Division of Victor Comptometer Corp.*, 223 N.L.R.B.

1169, 1172 (1976) (Member Walther, dissenting), *enforcement denied*, 587 F.2d 812 (6th Cir. 1977).

In 1977, the Board finally recognized the inherent contradiction in requiring due process for some unit employees, but not for others. It therefore held that due process required that nonunion unit employees be "given an equal unqualified opportunity to participate in [an] affiliation vote." *Jasper Seating Co.*, 231 N.L.R.B. at 1026. The Board thus announced that it would *not* amend certifications based upon affiliation votes that excluded nonunion employees.[5]

Jasper Seating constituted the governing precedent when Local 1182 conducted its limited franchise election in early 1978. However, by the time this case reached the Board in 1979, it had overruled *Jasper Seating* in *Amoco III*, 239 N.L.R.B. 1195 (1979), *remanded* 613 F.2d 107 (5th Cir. 1980), prompting vigorous protests by Board Members Jenkins and Penello. *See Providence Medical Center*, 243 N.L.R.B. 714, 716, 718 (1979) (Members Jenkins and Penello, dissenting separately). While this case was pending on remand in 1982, the Board returned to the rule of *Jasper Seating*, holding that all unit employees must be permitted to voice their preferences before the Board will change the statutory

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[5] Two of the five Board members denied an amended certification in *Jasper Seating* because the affiliation resulted from members-only voting. Board Member Penello concurred in rejecting the petition for an amended certification on the ground that a Board-conducted election was required when, as in *Jasper Seating*, "a small, independent local union . . . seeks to affiliate with an international union . . ." *Jasper Seating*, 231 N.L.R.B. at 1027. However, absent a clear change in the certified union's identity, Member Penello indicated that he "would not hesitate to agree" that an amended certification could be granted only based upon the results of a unit-wide vote. *Id.* In *Providence Medical Center*, 243 N.L.R.B. 714, 718 (1979) (Member Penello, dissenting), Member Penello expressly and without qualification condemned "members only" voting.

certification of their exclusive bargaining representative. The Board reasoned:

> If the Board is to accept privately conducted elections as a basis for amending Board certifications, it should be certain that minimal standards of due process be observed lest the very validity of Board certifications and elections be undermined. Granted that employees in a bargaining unit cannot be compelled to vote, they can, at the very least, be afforded *the opportunity to vote.* It appears basic to the collective bargaining process that the selection of a bargaining representative be made by the employees in the bargaining unit. In our view, therefore, a cardinal prerequisite to any change in designation of the bargaining representative is *that all employees* in the bargaining unit be afforded the opportunity to participate in such selection.

Amoco IV, 262 N.L.R.B. at 1241, quoting *North Electric Co.*, 165 N.L.R.B. at 944 (Members Jenkins and Zagoria, dissenting) (emphasis in original).

The Board found its rule necessary to protect the "basic" right of employees to choose their representative. To hold otherwise, the Board majority observed, "would deprive *employees* of the benefits guaranteed by the Act." *Id.* at 1242, n.12 (emphasis in original). This case, in which more than 45% of bargaining unit employees were deprived of the opportunity to decide whether they desired representation by an RCIU affiliate, graphically illustrates the deprivation that the Board's rule avoids. Because those employees had a statutory right to express their views, the Board's decision is firmly grounded in the Act.

C. The Decision Below Impairs Employees' Absolute Right to Choose Their Bargaining Representatives.

The simplicity and logic of the Board's rule cannot be directly assailed. Rather than do so, the decision below concluded that procedures followed prior to *Jasper*

Seating "adequately protected the critical rights of employees to be represented by a union selected by a majority of employees in the unit . . . ." Cert. App. 20a. In fact, however, the procedures that the court of appeals advocated would curtail employees' "critical rights" by allowing unions, the Board, and the courts to decide on an *ad hoc* basis that it is unnecessary to permit the exercise of those rights.

The court below relied upon the Board's inquiry into what is commonly known as "continuity of representation" to protect employees' freedom of choice.[6] *See* n.4, *supra*. Even when employees have acquiesced in affiliation through privately conducted elections, the Board has refused to amend its certification if the purported successor lacks continuity with the certified entity—*i.e.*, if it is a "new and different union." *See Standard Oil Co.*, 127 N.L.R.B. 656 (1960); *see also Independent Drug Store Owners*, 211 N.L.R.B. 701, 702, n.4 (1974), *aff'd sub nom. Retail Store Employees, Local 428 v. NLRB*, 528 F.2d 1225 (9th Cir. 1975) (amended certification denied despite approval of merger by unit employees). When continuity of representation is absent, the Board has held that a question concerning representation exists and the integrity of its certification requires it to supervise an election, rather than accepting the result of a less formal tally.

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[6] The court of appeals also suggested that decertification procedures adequately protect employees' Section 7 rights. Cert. App. 21a. This notion is repugnant to the Act. The court's rationale would justify virtually any impairment of free choice simply because employees "genuinely disgruntled" by their deprivation of rights could invoke decertification remedies. Cert. App. 21a. The cumbersome decertification procedure is appropriate only *after* unit employees have freely selected their representative. *See* 29 U.S.C. § 159(c)(1)(A)(ii) (decertification petition may assert that certified union "no longer" enjoys majority support). The statute presumes an initial unfettered expression of views, which is precisely what the Board's rule protects.

The court below asserted that this procedure protected employees by requiring an election whenever the Board concluded that affiliation created a "new" union. Cert. App. 20a. Thus, the court would prohibit the Board from requiring evidence of employee consent so long as it finds only an "insubstantial change in the certified bargaining representative" as a result of affiliation. Cert. App. 20a. Under the decision below, then, nonunion employees do not have *full* freedom to participate in a change in their designated representative. Instead, their freedom is "shrunk to a greatly limited freedom," *Hill v. Florida ex rel. Watson*, 325 U.S. at 542, which may be exercised only when the Board decides that, in *its* view, the amended certification would accomplish such a substantial change as to raise a question concerning representation.

The court of appeals did not explain why the Board, rather than affected unit employees, should be empowered to assess the change in representative. The Act provides no explanation. Rather, it contemplates that employees will have unfettered freedom of choice, that "[t]heir own best judgment, not that of someone else, [will] be their guide." *Hill v. Florida ex rel. Watson*, 325 U.S. at 541. In exercising this judgment, employees have the right to decide that they wish to be represented only by a nonaffiliated, independent union,[7] or by a local of one international rather than another. The Act's protection of that right cannot be nullified by an administrative de-

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[7] The importance of this consideration is evident here, given this unit's expressed desire to remain independent. In 1970, the Bank's employees rejected representation by an affiliate of a national body; the Independent's members in 1974 rejected affiliation with the OPEIU. R. 16-21 (J.A. 5-7). The Board, the International, and the courts are hardly in a position to determine what characteristics of these rejected organizations were significant in the eyes of unit employees. Such a determination would be necessary, however, to find disenfranchisement proper whenever the Board decides that no "substantial" change results from affiliation.

termination that similarities betwen a certified union and a newly affiliated organization assure represented employees of "continuity" of representation. The Act entitles *all* employees "to bargain collectively through representatives *of their own choosing*," § 7 of the Act, 29 U.S.C. § 157 (emphasis added), not through representatives that are, in the Board's judgment, "just like" the chosen representatives.

Thus, in this case, it is not for Local 1182, the Board, or the courts to decide whether the difference between the Independent and Local 1182 is significant enough to warrant a difference in employee support. All unit employees have "full freedom" to participate in that decision. By depriving nonunion unit employees of that statutory freedom, the decision below would sharply curtail their fundamental Section 7 rights in violation of the principles enunciated by this Court in *Hill*.

II. BY ASSURING THAT BARGAINING REPRESENTATIVE CERTIFICATIONS WILL NOT BE CHANGED WTHOUT EVIDENCE OF EMPLOYEE SUPPORT, THE BOARD'S RULE FURTHERS THE NATIONAL LABOR POLICY IN FAVOR OF MINIMIZING INDUSTRIAL STRIFE.

Congress passed the National Labor Relations Act to "mitigate and eliminate" the "obstructions to the free flow of commerce" that resulted from unbridled industrial strife. § 1 of the Act, 29 U.S.C. § 151. Principles of majority rule and freedom of association permeate the Act in recognition of the fact that labor peace can best be achieved by allowing workers to bargain through exclusive representatives chosen and supported by a majority of the represented employees. By enhancing full freedom of association, the Board's rule with respect to affiliations thus assists in minimizing the likelihood of industrial strife. In reaching a contrary conclusion, the court below improperly focused not upon the effects of

the rule, but upon the consequences of this union's violation of the rule in conducting its affiliation election.

A. Industrial Peace Can Be Achieved Only by Guaranteeing the "Full Freedom" of Employees to Select Their Bargaining Representatives, a Policy Furthered by the Board's Rule in this Case.

The efficacy of collective bargaining in minimizing labor strife depends upon the bargaining representative's ability to speak as the freely chosen voice of all employees. If the representative cannot do so, union commitments will lack the stabilizing effects contemplated by Congress. Thus, freedom of association helps achieve industrial peace because it permits the employer to enter into binding agreements with one exclusive representative selected by a majority of unit employees.

This Court has recognized that industrial peace and labor stability are inextricably intertwined with the "full freedom" of association that Congress conferred upon employees under the Act. In *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956), the Court observed that Section 1 of the Act bespeaks the "dual purpose" of eliminating "obstructions to the free flow of commerce" and encouraging collective bargaining. 350 U.S. at 279. Both of these policies, however,

> depend for their foundation upon assurance of "full freedom of association." *Only after that is assured* can the parties turn to effective negotiation as a means of maintaining "the normal flow of commerce and . . . the full production of articles and commodities . . . ." 61 Stat. 136, 29 U.S.C. § 141(b).

350 U.S. at 280 (emphasis in original). Thus, the Court continued, "[*p*]*rovided the selection of the bargaining representative remains free*," union commitments to refrain from striking advance the national goal of stability. 350 U.S. at 280 (emphasis in original).

The Court in *Mastro Plastics* tacitly recognized that the nation cannot buy industrial peace by sacrificing employee freedom. A labor organization lacking the freely expressed majority support of those whom it would represent cannot bring to its relationship with an employer the kind of stability necessary to "mitigate and eliminate" obstructions to commerce. The Board's rule on affiliations, by assuring that no exclusive bargaining agent will be certified until it demonstrates its ability to speak on behalf of the represented employees, thus advances the goal of stabilizing industrial relations.

B. The Board's Policy, if Honored, Will Also Enhance Stability in Bargaining Relationships.

In considering the goals of stability and industrial peace, the court below focused not upon freedom of association, but upon "maintaining stability in the bargaining representative . . ." Cert. App. 17a. The court of appeals observed that certain presumptions employed by the Board, with judicial approval, protect certified unions from continual questioning of their representative status. For example, labor organizations enjoy an irrebuttable presumption of majority status during the year following their certification, and a rebuttable presumption thereafter. *See Brooks v. NLRB*, 348 U.S. 96 (1954). Furthermore, "to protect the bargaining atmosphere," efforts to decertify an incumbent union will not be entertained during the life of a collective bargaining agreement. *See Pioneer Inn Associates v. NLRB*, 578 F.2d 835, 839 (9th Cir. 1978). Even after a contract's expiration, the Board will process a decertification petition only upon a request by at least 30% of the bargaining unit. 29 C.F.R. § 101.18.[8]

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[8] This 30% threshhold also applies to requests for an initial representation election. *See* 29 C.F.R. § 101.18(a) ("the conduct of an election serves no purpose . . . unless the petitioner has been designated by at least 30% of the employees"). Here, of course, only 25.17% of the unit voted for affiliation. Such minimal unit support

The principles underlying these rules do not support the conclusion reached by the court below. Each of these presumptions provides a measure of protection to the representative status of an incumbent union freely selected by a majority of bargaining unit employees. Nothing justifies the extension of these protections to a newly-affiliated union seeking *to obtain* certified status under Section 9(c) of the Act, 29 U.S.C. § 159(c), especially when a large segment of the represented employees has had no opportunity to participate in the affiliation decision. Rather, an amended certification logically requires a showing that the uncertified affiliated entity is entitled to the presumption of majority support reserved for the certified representative.[9]

In requiring this showing, the Board's rule on affiliations does not undermine the stability of bargaining relationships. The Board may allow amended certifications if the represented employees consent. In the absence of consent, the already certified entity will continue in its representational capacity. If these procedures are followed, all parties rest assured that the true employee representative is acting on unit employees' behalf. In this sense, the Board's "rule will promote stability more effectively than did its former position." Cert. App. 26a (Wright, J., dissenting). Disruption would occur only if

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would have been insufficient to warrant even an election to decertify the Independent or to certify Local 1182. For some reason, however, the court below believed this scant evidence of support sufficient to justify substituting Local 1182 for the Independent without further inquiry into employee sentiment.

[9] The court of appeals required no such showing. In finding that the Board's rule failed to advance the national goal of stability in labor relations, the court below simply asserted that it "effectively decertifies the newly affiliated union before any inquiry is conducted into the character of the union or its support among employees." Cert. App. 18a. This assertion begs the question. Whether the affiliated union was entitled to certification was the very issue presented by the affiliate's petition to the Board.

the affiliate attempted to proceed as bargaining representative notwithstanding an unwillingness to adhere to the Board's procedures or an inability to garner majority support in the bargaining unit.

Significantly, the court below did not point to single instance in which *compliance* with the Board's rule would lead to a disruption in bargaining relationships. Rather, it relied solely upon a description of the consequences of *Amoco IV*, asserting that the Board's decision in that case undermined the "stability objectives" of the Act. Cert. App. 19a. Had the union in *Amoco IV* allowed all represented employees to vote, however, no disruption would have occurred.[10] The unit would have expressed its wishes on affiliation. If affiliation had been disapproved, the bargaining relationship with the certified entity could have continued. If, however, the unit approved affiliation, the matter would have proceeded in the manner advocated by the court below.

In this case, the Bank advised the Independent that *Jasper Seating*, 231 N.L.R.B. 1025, required the union to permit all unit employees to vote if it intended the affiliation election to serve as the basis for an amended certification. R. 250-51 (J.A. 48); Exs. P-8 (J.A. 75-76),

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[10] In the same vein, the court cited with approval a commentator's argument that the Board's rule "will lead to temporary denials of representation in some cases where a majority of all unit employees unquestionably desire [sic] affiliation." Cert. App. 20a, n.13, citing Hale, *Union Affiliations: Examination of the Governing NLRA Standards*, 3 Det. C. L. Rev. 709, 732-37 (1983). Hale, however, relied solely on the consequences of the decision in *Amoco IV*, where the union did not allow all unit members to vote. It is impossible to envision circumstances in which *following* the Board's rule will lead to the consequences described by Hale and the court below. On the other hand, the decision of the court of appeals, by authorizing the exclusion of more than 45% of the Bank's employees, obviously risks imposing an unwanted international affiliate on the bargaining unit. It is impossible to discern how such a result enhances stability.

P-18 (J.A. 90-91); R. 37-38 (J.A. 12), 56-57; Ex. P-23 (d) (J.A. 92), R. 67 (J.A. 19). Nevertheless, the union *chose* to ignore governing law and to exclude nonmembers from the proceedings leading up to the request for an amended certification. The rule did not disrupt the bargaining relationship. The rule could cause no instability so long as it was followed. Only the Independent's calculated disregard of known prerequisites to an amendment of certification caused this case to exist.[11] The court below thus erred when, by expressing concern over stability, it showed more solicitude for the Independent's conscious violation of the existing Board rule than it did for the important policies underlying that rule.

III. THE BOARD'S DECISION DOES NOT IMPROPERLY INTRUDE UPON ANY LEGITIMATE INTERNAL UNION INTEREST.

The Board has concluded that an effort to obtain its approval of an affiliation implicates its statutory certification responsibilities and does not involve solely internal union interests. As the Board observed in *Amoco IV*:

> If, in fact, union affiliations are internal union matters why does the Board even look to see if adequate

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[11] The record sheds no light on the union's motives in proceeding with an election limited to union members despite its knowledge of *Jasper Seating*. Common sense suggests, however, that a union confident of its majority support in the bargaining unit would not risk doubt as to its legitimacy by restricting the vote to union members. Many unions have chosen to avoid question as to their majority support by allowing all represented employees to vote on the affiliation decision, *The Williamson Co.*, 244 N.L.R.B. 953, 954 (1979); *New Orleans Public Service, Inc.*, 237 N.L.R.B. 919, 920 n.5 (1978), while other unions have, after obtaining membership approval, held another vote on the transfer of certification, open to all unit employees. *St. Vincent Hospital*, 238 N.L.R.B. 1525, 1526 (1978), *enf'd*, 621 F.2d 1054, 1059 (10th Cir. 1980); *Ocean Systems, Inc.*, 223 N.L.R.B. 857, 859-60 (1976), *enf'd sub nom. J. Ray McDermott & Co. v. NLRB*, 571 F.2d 850 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978); *Safway Steel Scaffolds Co.*, 173 N.L.R.B. 311 (1968).

> due process has been achieved? The obvious answer to that question is that once either party raises the question of affiliation . . . it is incumbent upon the Board, before it places its imprimatur on an affiliation election, to assure that that election meets adequate due process standards.

262 N.L.R.B. at 1241. The Board's holding recognized a distinction between a union's internal decision to affiliate and its effort to obtain governmental certification as employees' exclusive bargaining representative. When certification is at issue, whatever internal union interest is implicated by an affiliation election must give way to the paramount national labor policy in favor of full freedom of choice in the selection of bargaining representatives. A fatal flaw in the decision below was its failure to perceive that Local 1182 did not seek certification from the Board for internal reasons, but for the sole purpose of achieving governmental recognition as the exclusive bargaining representative of Seattle-First National Bank's employees. The union had no legitimate interest in excluding nonunion unit employees from the vote that it hoped would lead to this recognition.

A. The Union's Use of an Affiliation Election as the Premise for Its Request for an Amended Certification Was Not an Internal Union Matter.

The court of appeals reasoned that an amended certification proceeding implicates only "internal union" interests, provided there is "continuity" between the certified union and the newly affiliated union. It therefore accepted "the union's characterization of all affiliation decisions as internal union affairs . . . ." Cert. App. 11a-12a, n.9.[12] Relying upon case law pertaining to disci-

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[12] As a practical matter, the RCIU did not perceive the affiliation to be an "internal" affair of the Independent. Rather, the RCIU's president saw the International's assimilation of the Independent as an opportunity to "further the organization of bank employees generally by the RCIU." Ex. P-3 (J.A. 70), R. 31 (J.A. 10).

pline of union members, *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967); *NLRB v. Boeing Co.*, 412 U.S. 67 (1973), election of union officers, *Steel Workers v. Sadlowski*, 457 U.S. 102 (1982), and limits on piece work pay received by union members, *Scofield v. NLRB*, 394 U.S. 423 (1969), the court below noted the policy against interference in internal union affairs. It rejected the Board's decision here as violating that policy. Cert. App. 11a-17a.

However, Local 1182's attempt to obtain the Board's ratification of its asserted status as exclusive bargaining representative was not sought for "internal" purposes. Instead, the newly affiliated union aimed to force the Bank to bargain with it and to obtain "certain statutory benefits under Section 8(b)(4) of the Act" that derive from certification. *National Electric Coil Division of McGraw-Edison Co.*, 199 N.L.R.B. 1017 (1972); *see* 29 U.S.C. § 158(b)(4)(B) (exempting certified union from certain charges of secondary activity); 29 U.S.C. § 158 (b)(4)(C) (precluding pressure on employer to bargain with any union other than certified union); *see also* 29 U.S.C. § 158(b)(7) (allowing certified union to conduct recognitional picketing). The International's affiliate thus intended to ensconce itself as the exclusive representative of all of the Bank's employees, not simply union members, and to sharply limit the ability of other unions, including grass roots organizations similar to the Independent, to challenge its status.[13] To achieve this goal, Local 1182 petitioned for a change in the Board's statutory certification.

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[13] Once certified, the affiliated entity could use as a shield the presumptions that the court of appeals identified as protecting an incumbent bargaining representative. *See* pp. 25-26, *supra*. If the reasoning of the court below were correct, then, the same policies that aid the affiliate in replacing the Independent could, after the affiliate is entrenched, be used to discourage an independent association from efforts to represent the Bank's employees.

In disposing of this petition, the Board did not, as the court below appeared to assume, even purport to consider the effect of an affiliation on the union in its capacity as a voluntary, private organization. The Board's ruling dealt only with the affiliate's request that the Board certify Local 1182 as the statutory representative of all unit employees. *See* Cert. App. 30a (Kennedy, J., dissenting from denial of en banc rehearing) (finding that this characterization of the issue was rational). This request, by definition, was entirely *external* to the union's powers as a voluntary association of dues paying members. By ignoring this fact, the decision below blurred "the important distinction between a union's status as a voluntary organization and its status as a certified or recognized bargaining agent." R. Williams, *NLRB Regulation of Union Bargaining Rights When Affiliation Changes* 24 (U. of Pa. 1982).

The failure of the court of appeals to differentiate between a union's dual roles explains its otherwise unaccountable reliance on *Allis-Chalmers*, *Boeing*, *Sadlowski*, and *Scofield*, none of which relates to a union's representative status.[14] Each of those cases concerned a

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[14] This failure also led to a revealing logical error. The court below conceded that the Board must ascertain whether the petitioning union can demonstrate "the absence of a 'question concerning representation' " raised by its proposed certification amendment. Cert. App. 8a; *see* 29 C.F.R. § 102.60(b). In resolving this question, the court reasoned, the Board should inquire into whether "the [affiliation] decision reflected the wishes of the union's members." Cert. App. 8a; *see also* Cert. App. 22a (due process inquiry must "protect union members' rights . . . to be represented by the organization of their choice"). But the sentiment of union members is utterly irrelevant to questions concerning representation. The Act protects *employee* freedom of choice; it does not mention free choice of *union members*. Employees retain their Section 7 right to choose their bargaining representative notwithstanding their nonunion status. *See Brown v. Hotel Employees Local 54*, 104 S. Ct. at 3192-93, n.3 (White, J., dissenting). If one acknowl-

union's authority over its members. In contrast, use of an affiliation election as the lever for a certification amendment brings into play the union's role as exclusive representative for *all employees*, members and nonmembers alike. *See* § 9(a) of the Act, 29 U.S.C. § 159 (a); *Abood v. Detroit Board of Education*, 431 U.S. 209, 221 (1977) (duty of fair representation extends to nonunion employees). When a union is designated to serve in this capacity, "the individual employee's power to order his own relations with his employer" is extinguished; the chosen union under federal law may bind even a nonmember to waivers of statutory rights, terms and conditions of employment, and provisions for processing his grievances.[15] *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. at 180. Consequently, the designation of an exclusive bargaining representative, whether through an amendment of certification or some other procedure, "affects the interests of all employees in the bargaining unit directly and equally, whether they choose to be union members or not." Williams, *supra* at 25. An affiliation vote thus is no longer an internal union affair once that vote is offered to the Board as justifying an amended certification.

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edges that evidence of consent of some employees is required, the Act demands that *all* unit employees have the opportunity to express their views.

[15] These "principles of majority rule and exclusive representation" are unique to this country's labor laws. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 Harv. L. Rev. 1394, 1397 (1971). Absent these characteristics of the Act, exclusion of nonunion employees from an affiliation decision might not be so troublesome, for the disenchanted employee could choose to bargain through other means. That option is not available under the Act. Disenchanted union members, on the other hand, may freely escape the "internal" consequences of a decision to affiliate or not to affiliate simply by resigning from the organization. *See Pattern Makers' League of North America v. NLRB*, No. 83-1894 (U.S. June 27, 1985) (protecting members' right to resign).

B. Even If the Amendment of Certification Implicated Internal Union Interests, the Board Appropriately Accommodated Those Interests and the "Full Freedom" of Employees in Selecting Their Bargaining Representatives.

Even if an amendment of certification implicates internal union interests, however, the court below improperly sacrificed the national labor policy in favor of employees' "full freedom" of choice in order to protect those interests. In stark contrast, the Board's rule accommodates a union's legitimate interest in managing its affairs with the unquestioned right of employees to participate in selecting their exclusive bargaining representatives. Only the Board's approach conforms to the Act's mandate.

When internal union interests clash with the Section 7 right to designate bargaining representatives, this Court has found the balance to tip in favor of protecting employee free choice. Such a result should surprise no one, for the Act by its terms protects employees, not unions. In *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973), for example, a union waived initiation fees for employees signing recognition slips during an organizational campaign. Involving the financial relationship between the union and its members, the union policy implicated a "legitimate" internal union interest in removing an "artificial obstacle" to union membership. 414 U.S. at 273-74, n.4, quoting *Amalgamated Clothing Workers v. NLRB*, 345 F.2d 264, 268 (2d Cir. 1965). But because this interest could be met without serving "the additional purpose of affecting . . . the election," *id.*, this Court held that the union's policy impermissibly conflicted with "[t]he right of a free choice . . . inherent in the principles reflected in § 9(c)(1)(A)." 414 U.S. at 279.

Similarly, a union's internal interest in affiliation need not impair employees' statutory right to participate in selecting their bargaining representatives. The Board's

ruling here preserves a union's control over the decision to affiliate or not to affiliate as an internal matter. Cert. App. 26a (Wright, J., dissenting). Unlike the rule adopted by the court below, however, it also preserves employees' right to consent to or refuse to support a change in the statutory certification of their exclusive collective bargaining representative. The Board's accommodation of these two rights was within its discretion—indeed, it was compelled by the Act.

The Board's decision protects yet another statutory freedom recognized in *Savair*. The Court there observed that the initiation fee waiver policy, by inducing union membership, might conflict with Section 7's guarantee of the right to *refrain* from concerted activity. 414 U.S. at 278-79. The same is true of a policy limiting affiliation votes to members, for it compels nonunion employees to join the union if they wish to air their views on an issue of representation. *See* Cert. App. 14a, n.10. To endorse this procedure "is to shut one's eyes to Section 7 [of the Act] . . . [which] clearly gives employees the choice . . . to refrain from engaging in [union] activities." *Amoco IV*, 262 N.L.R.B. at 1241.[16]

In these circumstances, simply concluding that an affiliation is an "internal" union affair, as did the court below, does not suffice to bar the Board from requiring a unit-wide vote before placing its stamp of approval on the results. *See* Note, *Union Mergers and the Amendment Certification Procedure*, 28 Cath. U. L. Rev. 587, 603 (1979) (protection of employees' Section 7 rights

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[16] The Board, with judicial approval, has held that an improper exclusion of nonmembers from a vote violates Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A), by coercing them to join a union. *Branch 6000, National Association of Letter Carriers*, 232 N.L.R.B. 263 (1977), *enf'd*, 595 F.2d 808 (D.C. Cir. 1978). Although no charge was filed against the union, it clearly engaged in this coercive practice by simultaneously limiting the franchise and urging nonunion employees to join the union in time to vote. Indeed, the Independent claimed to have gained 132 new members by using this tactic. R. 49 (J.A. 13).

justifies Board's rule even if affiliation is "internal" matter). Even when a rule applies solely to the conduct of union members, this Court has not found it exempt from Board scrutiny unless it "reflects a legitimate union interest, [and] impairs no policy Congress has imbedded in the labor laws . . ." [17] *Scofield v. NLRB*, 394 U.S. at 430.

In this case, the Independent's voting restriction went far beyond the rule considered in *Scofield*, affecting not only the conduct of union members, but also the statutory right of nonmembers to have a say in the change of the certification of their exclusive bargaining representative. No union has a legitimate interest in muting the voice of represented employees in such circumstances. To do so would thwart the national labor policy favoring free employee choice of bargaining representatives. Under *Scofield*, then, the Board is free to require, as it did here, that a union's effort to amend a statutory certification be accompanied by evidence that all represented employees had an opportunity to participate in the decision to seek the amendment.[18]

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[17] Significantly, *Scofield* permitted the Board in certain circumstances to scrutinize union rules in connection with unfair labor practice proceedings against a union. The justification for such scrutiny is far greater here, where the union itself has initiated the Board proceeding for the sole purpose of obtaining governmental approval of an affiliation.

[18] The Court recently rejected claims that the Board improperly intruded upon internal union affairs when it prohibited fines based on violations of union restrictions on resignation rights. *Pattern Makers' League of North America v. NLRB*, No. 83-1894 (U.S. June 27, 1985). It is important to note that the possibility of infringing upon legitimate internal union interests is not nearly as great here as it was in *Pattern Makers*. Dissenting in *Pattern Makers*, Justice Blackmun observed that rules which do "not vindicate any legitimate union interest" are not protected from scrutiny by the Board. Dissent, slip op. at 15, n.5, citing *Local 1384, UAW*, 227 N.L.R.B. 1045 (1977). The rule considered in *Pattern Makers*, Justice Blackmun argued, implicated a legitimate union interest in

IV. THE DECISION BELOW DEPARTS FROM THIS COURT'S DECISIONS BY SHOWING NO DEFERENCE TO THE BOARD'S ADOPTION OF SAFEGUARDS TO ENSURE THE FREE CHOICE OF BARGAINING REPRESENTATIVES.

The Board bears the responsibility of implementing the fundamental national policy of protecting employee freedom of choice. The means that it chooses in doing so rest within its sound judgment, subject to only limited review:

> Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees. [Citations omitted]

NLRB v. A. J. Tower Co., 329 U.S. 324, 330 (1946). Ignoring this fundamental precept of the Act, the court below independently balanced the Section 7 rights recognized by the Board against the assertedly conflicting policies of noninterference in union internal affairs and of preserving the stability of bargaining relationships. But this "balancing of interests . . . is the province of the Board, not the courts." [19] Cert. App. 25a (Wright, J.,

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maintaining solidarity during a strike. *Id.* at 12-13. The exclusion of nonunion unit employees from a decision to transfer the certification of *their* bargaining representative, on the other hand, advances no legitimate union goal. Instead, it impinges upon the express Congressional policy of employee free choice.

[19] The Board, not the courts, has the "primary responsibility" for accommodating conflicts between Section 7 rights and private property interests. *Hudgens v. NLRB*, 424 U.S. 507, 522-23 (1976). The Board, not the courts, must balance legitimate employer interests against employee rights under Section 7. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). And the Board, not the courts, has the duty of weighing the Section 7 right of employees to make a "fair and free choice of bargaining representatives" against "the asserted interest of employees in avoiding the problems that union solicitation may present." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969).

dissenting). The court thus usurped the Board's function as guardian of employee free choice in violation of principles of judicial review established by this Court.

The court below concealed its *de novo* review by asserting the irrationality of adopting a new procedure when the old one [illegible] in the court's judgment, "effective." Cert. App. 20a. The court of appeals thus found the Board's policy "irrational" simply because it failed to discern an improvement over prior Board rules. Such a broad use of the term "irrational" would, however, permit unfettered reassessment of every administrative decision and circumvent the deferential standard of review that this Court has prescribed in cases arising under the Act. As Judge Kennedy observed in dissenting from denial of en banc rehearing:

> Reason is a juridical concept essential for the constancy of our decisions, and we undermine it if we use the term "irrational" to express disagreement with a proposition supported by articulated premises within the boundaries of tenable argument.

Cert. App. 29a. *See also Hotel Employees and Restaurant Employees, Local 11 v. NLRB*, 760 F.2d 1006, 1009 (9th Cir. 1985) (Kennedy, J., concurring).

The refusal of the court below to acknowledge the limited scope of its task is reason enough to reverse its decision, for this Court has recognized that courts cannot reject Board policy based upon an independent appraisal of "need." In *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975), for example, the court of appeals independently evaluated the need for the Board's new rule granting employees the right to union representation at investigatory interviews. This Court rejected the lower court's effort to substitute a judicial judgment for the Board's:

> The Court of Appeals impermissibly encroached upon the Board's function in determining for itself that an employee has no "need" for union assistance

> at an investigatory interview. . . . It is the province of the Board, not the courts, to determine whether or not the "need" exists in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations.

420 U.S. at 266. The court below likewise "encroached upon the Board's function" when it concluded that, despite the recent surge in union affiliations and mergers,[20] there was no "need" for a unit-wide vote protecting the "full freedom" of unit employees to select their bargaining representatives. The Board, as the entity charged with issuing and policing certifications, has the duty of determining the procedures necessary to assure protection of statutory rights. The court below erred in failing to defer to the Board's determination of the need for its policy.

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[20] Organizing from above, without the benefit of Board procedures, has become disturbingly prevalent over the past five years. Between 1979 and June of 1984, more union mergers and affiliations occurred than in any similar period since 1955. Adams, *Labor Organization Mergers 1979-84: Adapting to Change*, 107 Monthly Lab. Rev. No. 9, Sept. 1984, at 21; *see also* Raskin, *Labor's Grand Illusions*, N.Y. Times Magazine, February 10, 1985, at 52, 67, col. 1. Most of these combinations were, like the affiliation here, "the result of an absorption of a small labor organization by a much larger one," including three absorptions by the international affiliate of Local 1182. Adams, *supra*, at 23-24. *See May Department Stores Co.*, 268 N.L.R.B. 979 (1984), *review pending sub nom. United Retail Workers Union Local 881 v. NLRB*, No. 84-2000 (7th Cir.) (applying *Amoco* rule to affiliation of multi-unit independent union with UFCW). This trend will not abate. According to a recent report of the AFL-CIO Committee on the Evolution of Work, "active AFL-CIO encouragement of mergers and guidelines as to appropriate and inappropriate mergers deserve a high priority." *Report of AFL-CIO Committee on the Evolution of Work on the Changing Situation of Workers and Their Unions, reprinted in* Daily Lab. Rep. (BNA) No. 37, at D-1, D-7 (February 25, 1985). Even that report concedes, however, that mergers "if poorly conceived, can cause a union to lose that identity which helps bind the members and the organization." *Id.*

CONCLUSION

For these reasons, the judgment and opinion of the United States Court of Appeals for the Ninth Circuit should be reversed. The Supplemental Decision and Order of the National Labor Relations Board should be reinstated.

Respectfully submitted,

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